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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term 1972

72-668

NO. ~~72-649~~

JOSE CISNEROS, ET AL, *Petitioners,*

v.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, *Respondents.*

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners here, referring to themselves hereafter as cross petitioners, are respondents in No. 72-649 on the docket of this Court, a petition of certiorari filed by the Corpus Christi Independent School District, et al, as petitioners on October 27, 1972.

Cross petitioners will file a brief in opposition to the petition for certiorari filed by the School District. By this petition, cross petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of

the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 2, 1972, so far as it remanded the case with instructions to the District Court to design a new plan of desegregation.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The opinions of the District Court are reported at 324 F. Supp. 599 and 330 F. Supp. 1377. All opinions appear in the Appendix to the petition for writ of certiorari filed by the Corpus Christi School District under Docket No. 72-649, to which Appendix we hereafter refer.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 2, 1972, and the mandate was issued on the same date. (Appendix, p. 155)

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in setting aside the District Court's desegregation order and in remanding the case for the sole reason that a new plan may require less transportation where admittedly the District Court followed the proper criteria and gave mature consideration to the original plan?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

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"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Southern District of Texas, Corpus Christi Division, on July 22, 1968. Cross petitioners are Mexican American and Negro parents who sued for their own children and as class action representatives on account of unconstitutional segregation of students by race and ethnic origin.

The District Court conducted two trials and rendered two opinions. The first trial began May 14, 1970, and culminated on June 4, 1970 in a Memorandum Opinion where the Court found that Mexican American and Negro students were unconstitutionally segregated from Anglo-American students by the defendant District.

The second trial lasted two weeks in September 1970 and was devoted exclusively to a consideration of various remedial plans for the elimination of segregation and the establishment of a unitary school system. The second trial culminated in a lengthy Memorandum Opinion dated July 2, 1971, wherein the District Court promulgated its plan together with a full analysis of the considerations involved in it. (Appendix 54-97)

On appeal, the Court of Appeals sitting *en banc* affirmed the District Court's fact findings and conclusions of law which determined the existence of unconstitutional segre-

gation on the basis of race and ethnic origin. Of the 15 judges who participated in the case, 8 joined in the majority opinion on the merits by Judge Dyer. These were Chief Judge Brown and Judges Wisdom, Gewin, Thornberry, Goldberg, Simpson and Ingraham. (Appendix 137) In addition, Judges Bell, Ainsworth, Morgan and Roney concurred in the result. (Appendix 137)

As to the remedy, a partial realignment of the judges resulted in a remand of the case to the District Court with directions to desegregate the school system in keeping with certain stated principles. It is this rejection of the District Court's judgment and plan and the consequent remand which cross petitioners challenge by this cross petition.

The "Remedy" portion of Judge Dyer's opinion (Appendix 137-140) was concurred in by nine of the judges, Judges Bell, Thornberry, Coleman, Ainsworth, Godbold, Morgan, Clark, Ingraham and Roney. (Appendix 140)

On the other hand, Judge Gewin, joined by four judges, Brown, Chief Judge, and Wisdom, Goldberg and Simpson, Circuit Judges, dissented from the remand. The same five judges also joined in a separate dissenting opinion by Judge Goldberg. Both dissenting opinions would affirm the order of the District Court with leave to that Court to amend the order as the practicalities of the situation require in order to avoid undue hardship or burden to the School District. (Appendix 145) The majority opinion on Remedy remanded the case for a single stated reason:

> "We now turn to the remedy faced by the district court. We conclude that a different approach may achieve a constitutional result without involving the conversion of the school system from a non-transpor-

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tation to a transportation basis to the extent ordered by the district court." (Appendix 137)

The same majority directed the District Court "to desegregate the school system on the following basis:" (Appendix 137-140)

1. It is the prerogative and duty of the School District to formulate and implement student assignment plans.

2. Where unconstitutional segregation has been found, it is the duty of the School District to formulate and implement student assignment plans which will remedy the discrimination found to exist.

3. If the school officials abdicate this responsibility, the District Court should proceed forthwith to remedy the discrimination.

4. It is apparent that student assignment on a strict neighborhood basis will not suffice in Corpus Christi, although it may suffice as to some schools.

5. Pairing, clustering, and realignment of zones, will be methods to eliminate segregation.

6. If after using the above procedures segregated schools still exist, the Court must consider pairing or clustering of schools in noncontiguous school zones. This should be a last resort, and student transportation requirements should be minimized.

7. Any particular degree of racial balance or mixing as a matter of substantive constitutional right would be disapproved, although interim corrective measures are constitutionally permitted.

Finally, mandatory majority-to-minority transfers with transportation provided as ordered by the District Court

will be an overall ameliorative device, the majority held. The District Court was directed to constitute a tri-ethnic committee to foster the use of the majority-to-minority transfers.

As stated by the dissenting opinions, the District Court had already followed these steps in designing its own plan. (Appendix 143; 144; 149; 150)

REASONS FOR GRANTING THE WRIT

1. The anguished dissenting opinions of Judges Gewin and Goldberg demonstrate the District Court's desegregation plan is completely unimpeached. There is no articulated respect in which the District Court's plan has been found defective. There is no better plan, device or approach which has been suggested.

2. Thus, the remand of the case to retrack identical procedures without constitutional reasons conflicts with the decision of this Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), as well as *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969).

As stated, the only reason that the District Court's desegregation plan was set aside in favor of remand was that "a different approach *may* achieve a constitutional result" without transportation to the extent ordered by the District Court. (Appendix 137)

This was the exact posture of *Swann.* Certiorari was granted in *Swann* after the Court of Appeals remanded to the District Court for reconsideration and submission of further plans because the Court of Appeals "feared that the pairing and grouping of elementary schools would

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place an unreasonable burden" on the school board and pupils. 402 U.S. p. 10. This Court directed reinstatement of the District Court's order pending further proceedings at the same time it granted certiorari. 399 U.S. 926.

A comparison of the reasons for remand given in this case with those stated by the Fourth Circuit in *Swann* at 431 F.2d p. 147 will demonstrate that a majority of the Court of Appeals has experienced the same momentary relapse which was previously suffered by the Court of Appeals in *Swann.*

The remand below under these circumstances was likewise in conflict with *Alexander v. Holmes County Board of Education,* 396 U.S. 19, which abandoned "all deliberate speed" as a constitutionally permissible approach to the duty of desegregation. In that case, as in *Swann,* the Supreme Court directed that desegregation plans be effectuated immediately with appropriate leave to the courts below to entertain such suggestions for modification as experience might commend.

The deceision below is also in conflict with *Davis v. Board of School Commissioners of Mobile County,* 402 U.S. 33 (1971) for the reasons articulated by Judge Gewin set out in Point 4 below.

3. The point was made in *Swann* that the Supreme Court must rely, as it has for more than 16 years, "on the informed judgment of the district courts in the first instance and on courts of appeal." 402 U.S. 28. This case is a serious departure from this practice. Cross petitioners suggest that few cases if any will present such an exhaustive inquiry into the problems as was performed by the District Judge in this case.

The question of an appropriate plan was under litigation in the District Court for a period of *ten months.* The Court repeatedly asked for cooperation from the School District but received only nominal, constitutionally insufficient suggestions from it. The Court considered a plan submitted by the Department of Health, Education and Welfare. The District Court also heard expert testimony in support of a plan submitted by plaintiffs. The Court also gave the School District full opportunity to object to all plans submitted, of which the School District took advantage.

4. All of the agonizing considerations which have been faced during the last 18 years are resurrected by this incomprehensible remand. The dissenting opinions of Judge Gewin and Judge Goldberg state the matter as well as can be. Judge Gewin wrote: "After years of tortuous school desegregation litigation in this court reflected by hundreds of opinions in numerous volumes, the majority now stumbles and falters over issue which we have decided and laid to rest in almost every geographical area of this circuit." (Appendix 141)

Judge Gewin wrote further: "We have not been a timid or inactive court in dealing with these problems. At times I have disagreed and have expressed my views in dissents, but the court is bound and should be bound by the long list of majority decisions we have rendered." (Appendix 142)

Judge Gewin further wrote: "I believe the Supreme Court has delineated the standard with respect to transporation of students. In *Davis v. Board of School Commissioners of Mobile County,* 402 U.S. 33, 28 L.Ed.2d 477 (1971) the Court rejected a desegregation plan pre-

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pared by this court because it was based on treating the western section of the county in isolation from the eastern section. . . . Without reason or authority the majority opinion abandons the mandate of *Davis* and other Supreme Court decisions." (Appendix 144-145)

Judge Goldberg wrote: "This is not the hour, this is not the day, and Corpus Christi is not the place for courts to flag in their striving for constitutional schools, for quality education, for integrated education." (Appendix 153)

5. Cross petitioners have been relegated to another round of litigation and delay under standards which are not comprehensible. The District Court's order and opinion were written in the light of *Swann* with full and adequate technical advice as well as competent assistance of adverse counsel. On the other hand, a majority of the Court of Appeals has remanded without giving direction or purpose other than the suggestion that relief may be adequate with less transportation. This treatment of the case at the Court of Appeals level is unfortunately reminiscent of judicial performance which permits dilatory tactics by school districts.[1]

CONCLUSION

For the reasons set forth, it is respectfully prayed that a writ of ceriorari issue to review that part of the judgment and opinion of the United States Court of Appeals

1. Cross Petitioner's problem is further compounded by the transfer of the case by Chief Judge Connally of the District from District Judge Seals who tried the case to newly appointed Judge Cox assigned to the Corpus Christi Division. This transfer occurred while the case was pending in the Fifth Circuit (Appendix 126).

for the Fifth Circuit which remands the case for further consideration of desegregation plans.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on October ____, 1972, three copies of the foregoing petition for writ of certiorari were served upon each party of record by depositing a copy thereof in the United States Post Office, with air mail postage prepaid, properly addressed to counsel of record as follows:

Mr. Richard A. Hall and Mr. J. W. Gary, 200 Hawn Building, Corpus Christi, Texas 78401; and Mr. Donald L. Howell, First City National Bank Building, Houston, Texas 77002, attorneys for Corpus Christi Independent School District, et al, respondents;

Hon. Richard Kleindienst, Attorney General of the United States, United States Department of Justice, Washington, D. C. 20530;

Hon. Erwin Griswold, Solicitor General of the United States, United States Department of Justice, Washington, D. C. 20530.

Chris Dixie

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In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-649 and 72-668

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

JOSE CISNEROS, ET AL., CROSS PETITIONERS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This school desegregation class action was brought on July 22, 1968, by black and Mexican-American parents of children in the Corpus Christi Independent School District. Following an initial trial, the district court found that both blacks and Mexican-Americans were unconstitutionally segregated in the Corpus Christi schools as a result of official actions by the defendants (Pet. App. 1-52). The court of appeals denied the defendants' petition for permission to appeal the interlocutory order of the district court (Pet. App. 53).

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Thereafter, various desegregation plans were submitted by the parties, and the district court held a hearing with respect to the relief to be ordered. On October 16, 1970, the district court requested the assistance of the United States Departments of Justice and Health, Education, and Welfare. The Department of Justice, pursuant to the court's request, applied for and was granted leave to intervene. After receiving a desegregation plan prepared by the Department of Health, Education, and Welfare, and objections thereto by both plaintiffs and defendants, the district court on July 2, 1971, ordered the implementation of its own plan, reflecting elements of the plans submitted by the parties, with certain alterations made by the court (Pet. App. 54–103).

The defendants appealed from the district court's judgments holding that black and Mexican-American students were unconstitutionally segregated in the Corpus Christi schools and requiring implementation of the student assignment plan set forth in the court's opinion of July 2, 1971.[1] The July 2 order was stayed pending a decision by the court of appeals (Pet. App. 104–105). On August 2, 1972, the court of appeals affirmed the finding of unconstitutional segregation, but directed the district court to use a different approach in fashioning a remedy on remand (Pet. App. 119–154).

1. The district court found that the defendants had discriminated against black and Mexican-American students by gerrymandering attendance zone bound-

[1] The petitioners do not seek review in this Court of the findings regarding black students.

aries, discriminating in construction and location policies for new and existing schools, discriminating in faculty assignment policies, promoting segregation in transfer policies, and failing to take reasonable steps to promote desegregation generally (Pet. App. 31–36). The Corpus Christi school system was therefore held to be *de jure* segregated (Pet. App. 36). The court of appeals, while not disapproving the district court's findings, concluded that "the direct and effective cause of segregation in the schools" was the defendants' imposition of "a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result" (Pet. App. 131). The court of appeals also held that discriminatory intent, in the form of racially motivated state action, need not be shown to establish a violation of students' constitutional rights (Pet. App. 132–134).

The school district's petition presents questions concerning the standards for determining whether schools are *de facto* or *de jure* segregated and the extent to which discriminatory intent by school officials must be shown to support a finding that a student assignment policy is unconstitutional.[2] In our view, as ex-

[2] The petition presents five questions (Pet. 3–4), three of which concern the extent of a school district's duty to "eliminate unintended ethnic [Mexican-American] concentrations in some of the schools which result from residential and demographic patterns not effected by state action" or to abandon the neighborhood school concept in the face of such concentrations. The last two questions relate to the appropriate scope and timing of a desegregation remedy where at least some discrimi-

pressed in our brief below and our brief as *amicus curiae* in *Keyes* v. *School District No. 1, Denver, Colorado, et al.*, No. 71–507, this Term (argued October 12, 1972), specific school board actions or policies which cause or promote segregation *on account of race or national origin* must be remedied. While failure to show subjective segregative motivation by school board officials is irrelevant to the determination of unconstitutional segregation of public schools (cf. *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462), circumstances showing their explicit consideration of race or implicit race-consciousness are of central importance. If the court below meant to direct that the inquiry should ignore the question of objective intent and focus only on the elements of state action and segregative effect,[3] its opinion would seem to prohibit racial imbalance in a neighborhood school system regardless of whether discrimination exists. We submit that such a result would be inconsistent with this Court's affirmance of *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D. N.J.), affirmed, 404 U.S. 1027, and with its opinion in *Jefferson* v. *Hackney*, 406 U.S. 535, 547–549.

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natory action toward Mexican-Americans is found in a system where that ethnic group has never been segregated by statute.

[3] The majority opinion (Pet. App. 129) states that *Brown* "requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action."

Accordingly, if this Court agrees with the analysis suggested in our *amicus curiae* memorandum in *Keyes*, an appropriate disposition here would be to grant the petition, vacate the judgment below, and remand for further consideration in light of *Keyes*. The Court may therefore wish to defer action on the petition pending its decision in *Keyes*.

2. In addition, the court below (Pet. App. 136–137) ordered the fashioning of broad brush, system-wide desegregation relief, of the sort traditionally applied in remedying statutory dualism, as opposed to school-by-school relief based on a showing with respect to each that the segregation has been caused by intentional segregative action on the part of the school board. As we argued below, however, whether the relief appropriate in a case of statutory dualism is appropriate in a case such as this depends upon the extent of the proved discrimination.

Finally, while approving a system-wide remedy, the court of appeals concluded that a proper remedy could be achieved without increasing student transportation to the extent required by the district court (Pet. App. 137). It therefore remanded the case for the application of specified remedial guidelines (Pet. App. 137–140). The cross-petition of Cisneros presents the question whether a remand on this basis was erroneous (Cross-Pet. 2).

These issues with respect to the remedy may also be resolved by this Court in *Keyes*. The Court, therefore, may wish to postpone disposition of the present petitions pending its decision in *Keyes*.

Respectfully submitted.

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DAVID L. NORMAN,
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DECEMBER 1972.

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